

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

December 31, 2001

IN RE:

**COMPLAINT OF XO TENNESSEE,
INC. AGAINST BELL SOUTH
TELECOMMUNICATIONS, INC.**

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DOCKET NO. 01-00868

**ORDER FROM NOVEMBER 30, 2001
PRE-HEARING CONFERENCE**

This docket came before the Hearing Officer at the November 30, 2001 Pre-Hearing Conference for consideration of the *Motion for Continuance of Hearing* filed by Access Integrated Network, Inc. ("AIN"), XO Tennessee, Inc. ("XO"), and ITC^DeltaCom ("DeltaCom") on November 27, 2001; the *Motion to Amend Complaints* filed by AIN and XO on November 29, 2001; the *Motion to Compel the Testimony of Witnesses* filed by AIN and XO on November 29, 2001; and the *Motion to Make Documents Public* filed by AIN and XO on November 30, 2001.

I. Procedural History

AIN filed a complaint against BellSouth Telecommunications, Inc. ("BellSouth") on September 18, 2001. The complaint was assigned Docket No. 01-00808. XO filed a complaint against BellSouth on October 9, 2001. This complaint was assigned Docket No. 01-00868. Both complaints alleged that BellSouth violated the terms of the Key Business Discount Program and,

thereby, Tennessee statutes and Tennessee Regulatory Authority ("Authority") Rules by offering customers three free months of service.¹

At the September 25, 2001 Authority Conference the Directors ordered BellSouth to respond to AIN's complaint by October 2, 2001.² At the October 3, 2001 Authority Conference, the Authority considered XO's complaint in Docket No. 01-00868. The Authority appointed General Counsel or his designee to act as the hearing officer to determine the merits of XO's complaint, directed the hearing officer to determine whether Docket Nos. 01-00808 and 01-00868 should be consolidated, instructed the hearing officer to attempt to resolve XO's complaint within sixty (60) days of the file date, and ordered BellSouth to respond to XO's complaint by October 25, 2001.³

BellSouth filed its answer to AIN's complaint on October 2, 2001. BellSouth admitted that the alleged incident occurred, stated that it is BellSouth's policy to offer services in conformance with tariffs, and stated that it has suspended all marketing by BERRYDirect.⁴ BellSouth filed its answer to XO's complaint on October 25, 2001. Once again, BellSouth admitted that the alleged incident occurred, but denied that the Authority should issue a show cause order citing the fact that BellSouth has suspended "all of these sales activities by BERRYDirect and BellSouth to Tennessee customers."⁵

In the midst of the complaint and answer process, AIN filed a *Motion to Open Show Cause Proceeding* in Docket No. 01-00808. In the motion, AIN referenced its complaint filed in Docket No. 01-00808, XO's complaint filed in Docket No. 01-00868, and a third instance that

¹ See Docket No. 01-00808, *Complaint of Access Integrated Networks, Inc.*, paras. 3-6 (Sept. 18, 2001); Docket No. 01-00868, *Complaint of XO Tennessee, Inc.*, paras. 3, 5 & 6 (Oct. 9, 2001).

² See Docket No. 01-00808, *Order Directing Filing of Response* (Nov. 28, 2001).

³ See Docket No. 01-00868, *Order Appointing Hearing Officer* (Nov. 7, 2001).

⁴ BellSouth engaged BERRYDirect to market the Key Business Discount Program. See Docket No. 01-00808, *Answer of BellSouth Telecommunications, Inc.*, para. 3 (Oct. 2, 2001).

⁵ See Docket No. 01-00868, *Answer of BellSouth Telecommunications, Inc.*, para. 3-5, 8 (Oct. 25, 2001).

allegedly occurred in Southhaven, Mississippi. AIN concluded by asserting that this “matter is far broader than a dispute between BellSouth and a competing carrier.”⁶

BellSouth filed its response to the *Motion to Open Show Cause Proceeding* on October 24, 2001. BellSouth asserted that the motion should be dismissed because the allegations set forth in the motion are the subject of XO’s and AIN’s complaints and explained that there is nothing to gain from convening another docket.

On October 24, 2001, the Consumer Advocate filed petitions to intervene in both dockets. In each petition, the Consumer Advocate asserted that its intervention is on behalf of Tennessee consumers who will be adversely affected by price discrimination. In the petition filed under Docket No. 01-00808, the Consumer Advocate stated: “The possibility that misrepresentations may be more pervasive concerns the Attorney General and therefore, he believes an investigation is necessary and appropriate under the existing circumstances.”⁷

On October 26, 2001, BellSouth filed its non-proprietary responses to the Authority’s data requests issued on October 12, 2001. BellSouth explained that it would file its proprietary responses upon the entry of a protective order. On October 26, 2001, AIN and XO filed a letter stating that they believed the proposed protective order entered should be amended to permit the distribution of proprietary information to “other, appropriate state and federal agencies.”⁸ BellSouth filed a responsive letter on October 31, 2001. BellSouth disagreed with AIN and XO’s request and asked that the Authority enter the standard protective order.

On November 1, 2001, AIN and XO filed motions to take discovery. AIN and XO attached identical requests to their respective motions. In addition, both complainants requested

⁶ Docket No. 01-00808, *Motion to Open Show Cause*, p. 5 (Oct. 16, 2001).

⁷ *Id.*, *Attorney General’s Petition to Intervene*, pp. 2-3 (Oct. 24, 2001).

⁸ Docket Nos. 01-00808 & 01-00868, Letter of AIN and XO, p. 1 (Oct. 26, 2001).

that the Authority order BellSouth to respond within ten days. BellSouth filed its response to the motions on November 2, 2001 objecting to the ten-day response period requested by AIN and XO.

On November 6, 2001 the Hearing Officer entered an *Order* addressing the Authority's directive of September 25, 2001 and many of the above-mentioned filings. The Hearing Officer found that there was no need for these dockets to proceed independently of one another, and therefore, decided to consolidate the dockets and ordered that all future filings be entered under Docket No. 01-00868.⁹ The Hearing Officer also granted the intervention of the Consumer Advocate, ordered the parties to file the Protective Order without the additional language requested by AIN and XO, and directed BellSouth to respond to AIN's and XO's discovery requests by November 16, 2001.¹⁰ Thereafter, the Hearing Officer determined that the actual remedy available as a result of the filing of the complaints and the *Motion to Open a Show Cause Proceeding* is the opening of an investigation.¹¹ The Hearing Officer also ordered AIN and XO to file a more definite statement enumerating the specific statutes and/or Authority rules allegedly violated by BellSouth and requested that the parties file briefs on the issue of whether the Authority is a court for the purposes of Tenn. Code Ann. § 65-4-122.¹² Lastly, the Hearing Officer set forth a procedural schedule which provided that the Hearing would commence on December 3, 2001.¹³

On November 8, 2001, ITC^DeltaCom filed a *Petition to Intervene*. On November 13, 2001, the Hearing Officer issued a *Notice of Filing* requiring that parties file responses to the

⁹ See *id.*, *Order*, p. 5 (Nov. 6, 2001).

¹⁰ See *id.* at 6-9.

¹¹ See *id.* at 11.

¹² See *id.* at 11-12.

¹³ See *id.* at 12.

petition by 2:00 p.m., November 14, 2001. At the request of BellSouth, the Hearing Officer extended this time to November 16, 2001, 2:00 p.m.¹⁴ No responses having been filed, the Hearing Officer granted the petition.¹⁵

On November 9, 2001, BellSouth filed a *Motion to Convene Mediation Conference*. The motion stated that BellSouth would like to resolve the complaints expeditiously by negotiated agreement. AIN and XO filed the *Response of XO Tennessee, Inc. and Access Integrated Network, Inc. to BellSouth Telecommunications, Inc.'s Mediation Proposal* on November 13, 2001. XO and AIN explained that they did not oppose attempting to resolve the complaints by negotiated agreement so long as BellSouth first responded to their discovery requests. On November 14, 2001, the Consumer Advocate filed comments stating that it too did not oppose the motion provided BellSouth first complied with discovery production and that show cause proceedings commence absent a settlement. The Hearing Officer granted the motion and entered an order scheduling the mediation for Wednesday, November 28, 2001 at 1:00 p.m.¹⁶

On November 13, 2001, AIN and XO filed a *Memorandum Concerning Jurisdiction, Potential Violations and Proposed Relief*. On that same day, BellSouth filed *BellSouth Telecommunications, Inc.'s Brief Addressing Section 65-4-122*.

BellSouth filed discovery responses on November 16, 2001, and again on November 19, 2001, after the entry of the protective order. In its November 16th filing, BellSouth provided a limited response to Interrogatory No. 10. On November 20, 2001, AIN and XO filed a *Motion to Compel Responses to Discovery* specifically directed at this response. In its motion, AIN and XO asked the Hearing Officer to compel BellSouth to respond fully to Interrogatory No. 10,

¹⁴ See Docket No. 01-00868, *Order Granting Extension* (Nov. 14, 2001).

¹⁵ See *id.*, *Order Granting Intervention* (Nov. 19, 2001).

¹⁶ See *id.*, *Order Granting Motion to Convene Mediation Conference* (Nov. 19, 2001).

which states: "List, on a customer by customer basis, all goods services or benefits of any kind provided by BellSouth Select, Inc. to any Tennessee customer. In your response, provide the estimated monetary value of those benefits to each customer."¹⁷ The Hearing Officer granted the motion in part by directing BellSouth to list, if it had not done so already, on a customer by customer basis, all goods, services or benefits of any kind provided by BellSouth Select, Inc. to any Tennessee customer in exchange for purchasing services through the Key Business Discount Program by November 26, 2001.¹⁸

On November 26, 2001, the Hearing Officer issued a *Notice of Filing* as a reminder that the Pre-Hearing Conference was scheduled for November 30, 2001 and the Hearing was scheduled to begin on December 3, 2001. The *Notice of Filing* also requested that the parties file any pre-hearing motions by 2:00 p.m. Thursday, November 29, 2001. Thereafter, AIN, XO and DeltaCom filed a *Motion for Continuance of Hearing* on November 27, 2001 and AIN and XO filed a *Motion to Amend Complaints* and *Motion to Compel the Testimony of Witnesses* on November 29, 2001. Additionally, on November 30, 2001, BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Motion for Continuance of Hearing* and AIN and XO filed a *Motion to Make Documents Public*.

II. The Pre-Hearing Conference

The Hearing Officer convened the Pre-Hearing Conference as scheduled at 9:00 a.m., Friday, November 30, 2001. The parties in attendance were as follows:

XO Communications, Tennessee – **Henry Walker**, Esquire, Boulton, Cummings, Conners & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062; and **Dana Shaffer**, Esquire, 105 Molloy Street, Suite 300, Nashville, TN 37201;

Access Integrated Networks, Inc. – **Henry Walker**, Esquire, Boulton, Cummings, Conners & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

¹⁷ Docket No. 01-00868, *Motion to Compel Responses to Discovery*, p. 1 (Nov. 20, 2001).

¹⁸ See *id.*, *Order Granting In Part Motion to Compel Responses to Discovery* (Nov. 21, 2001).

ITC^DeltaCom – **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter – **Timothy Phillips**, Esquire and **Chris Allen**, Esquire, Consumer Advocate and Protection Division, John Sevier Building, 3rd Floor, 425 5th Avenue North, Nashville, TN 37243-0500; and

BellSouth Telecommunications, Inc. (“BellSouth”) – **Guy M. Hicks**, Esquire, 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300 and **Patrick Turner**, Esquire, 675 W. Peachtree Street, Suite 4300, Atlanta, GA 30375, who participated telephonically.

During the Pre-Hearing Conference, the Hearing Officer addressed the *Motion for Continuance of Hearing*, the *Motion to Amend Complaints*, the *Motion to Compel the Testimony of Witnesses*, and the *Motion to Make Documents Public*. In addition, the Hearing Officer worked with the parties to develop a procedural schedule to completion.

A. *Motion for Continuance of Hearing and Motion to Amend Complaints*

In the *Motion for Continuance of Hearing*, AIN, XO and DeltaCom argued that a continuance is necessary because counsel for AIN, XO and DeltaCom represents several parties in another docket the hearing of which is also scheduled to begin on December 3, 2001.¹⁹ In its response, BellSouth argued that a hearing in this docket is “neither necessary nor appropriate,” but posited that if the Hearing Officer finds otherwise, the Hearing should commence as scheduled on December 3, 2001.²⁰ The Consumer Advocate did not assert a position on the continuance.²¹

In the *Motion to Amend Complaints*, AIN and XO asserted that “it is now apparent that the two instances of illegal conduct alleged in the complaints are not isolated incidents . . . but

¹⁹ See Docket No. 01-00868, *Motion for Continuance of Hearing*, p. 1 (Nov. 27, 2001)

²⁰ *Id.*, BellSouth Telecommunications, Inc. 's Response to Motion for Continuance of Hearing, p. 1 (Nov. 29, 2001).

²¹ Transcript of Proceedings, Nov. 30, 2001, p. 5 (Pre-Hearing Conference).

are part of a region-wide marketing plan called BellSouth Select that began in 1999.”²² Based on this “additional information,” AIN and XO requested that they be permitted to amend their complaints to add eight paragraphs related to the BellSouth Select program.²³ During the Conference, BellSouth objected to the motion and argued that these complaints should be concluded and AIN and XO permitted to file additional complaints if they so choose.²⁴ The Consumer Advocate did not offer any comments.²⁵

Upon consideration of the filings and comments of the parties, the Hearing Officer granted the *Motion to Amend Complaints*.²⁶ The Hearing Officer found that it would be more efficient to resolve these matters in one proceeding, rather than addressing the broader allegations against BellSouth Select in a separate proceeding. In addition, the Hearing Officer recognized that the Directors had requested that the Hearing Officer attempt to resolve these complaints within sixty (60) days and admitted that the granting of the *Motion to Amend Complaints* rendered that goal unattainable. In keeping with the spirit of the Director’s request, however, the Hearing Officer made it clear that it was her intent that the complaints, as amended, be resolved expeditiously. The Hearing Officer also recognized that if the allegations prove to be true, then there exists an unfavorable environment for competition and, therefore, timely resolution is necessary. Thereafter, the Hearing Officer granted the *Motion for Continuance of Hearing* finding that there is a need for additional pre-hearing preparation in light of the amended complaints.

²² Docket No. 01-00868, *Motion to Amend Complaints*, p. 1 (Nov. 29, 2001).

²³ *Id.* at 2-3.

²⁴ Transcript of Proceedings, Nov. 30, 2001, p. 8-9 (Pre-Hearing Conference).

²⁵ *Id.* at 12.

²⁶ During the Pre-Hearing Conference, the Hearing Officer asked Counsel for AIN and XO about the citation to Tenn. Code Ann. § 65-4-117 at the bottom of page two of the *Motion to Amend Complaints*. Counsel stated that there was a typographical error and stated that the correct section is 65-4-115. Transcript of Proceedings, Nov. 30, 2001, p. 18-19 (Pre-Hearing Conference).

B. *Motion to Compel Testimony of Witnesses*

During the Conference, a great deal of discussion involved the need for a hearing and the presentation of witnesses at the hearing. At the suggestion of the Hearing Officer, the parties agreed that they would submit comments upon completion of discovery on whether a formal hearing is necessary or whether the Hearing Officer should render a decision based upon a stipulated evidentiary record and the pleadings. In the event that a formal hearing is deemed necessary, the Hearing Officer agreed that the parties should be permitted to call hostile witnesses in order to present their respective direct proof. The Hearing Officer also ruled that a party must submit pre-filed testimony of any non-hostile witness that the party wishes to call to testify at the Hearing. In light of these agreements and rulings, the Hearing Officer finds that the *Motion to Compel the Testimony of Witnesses* should be dismissed without prejudice.

C. *Motion to Make Documents Public*

The Hearing Officer deferred decision on the *Motion to Make Documents Public* pending the filing of responses as set forth in the procedural schedule below. The Hearing Officer further stated that after reviewing the responses she would determine whether a status conference was necessary prior to disposing of the motion.

D. *Procedural Schedule*

With the cooperation of all of the parties, the Hearing Officer developed the Procedural Schedule attached hereto.

IT IS THEREFORE ORDERED THAT:

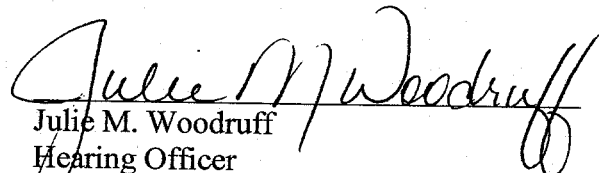
1. The *Motion for Continuance of Hearing* filed by Access Integrated Networks, Inc., XO Tennessee, Inc. and ITC^DeltaCom on November 27, 2001 is granted.

2. The *Motion to Amend Complaints* filed by Access Integrated Networks, Inc. and XO Tennessee, Inc. on November 29, 2001 is granted.

3. The *Motion to Compel the Testimony of Witnesses* filed by Access Integrated Networks, Inc. and XO Tennessee, Inc. on November 29, 2001 is dismissed without prejudice.

4. The *Motion to Make Documents Public* filed by Access Integrated Networks, Inc. and XO Tennessee, Inc. on November 30, 2001 is deferred.

5. All filings shall be made in accordance with the Procedural Schedule attached hereto. Filings shall be filed in the Executive Secretary's office by 2:00 p.m. on the specified date as provided for in Rule 1220-1-1-.11 and served on each of the parties via hand-delivery or facsimile. Testimony of witnesses shall be filed individually, separately paginated, and contain the caption of the case on the first page.


Julie M. Woodruff
Hearing Officer



K. David Waddell, Executive Secretary

PROCEDURAL SCHEUDLE

Friday, December 7, 2001¹

- BellSouth's Answer to Amended Complaint
- Responses to *Motion to Make Documents Public*
- Consumer Advocate Response to *BellSouth Telecommunications, Inc.'s Brief Addressing Section 65-4-122*²

Tuesday, January 15, 2002

- Completion of all Discovery

Tuesday, January 22, 2002

- Comments on Need for Formal Hearing
- Witness List Containing Designations of Hostile Witnesses
- Joint Stipulations of Fact

Wednesday, January 23, 2002

- Status Conference

Friday, January 25, 2002

- Pre-Filed Direct Testimony of All Non-Hostile Witnesses

Wednesday, January 30, 2002

- Pre-Filed Rebuttal Testimony

Friday, February 1, 2002

- Pre-Hearing Conference³

Monday, February 4, 2002 through completion

- Hearing

¹ BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Motion to Make Documents Public* and *BellSouth Telecommunications, Inc.'s Answer to Supplemental Paragraphs to Complaints* on December 7, 2001.

² During the Conference, the Consumer Advocate requested the opportunity to file this response. BellSouth did not object, provided it would be afforded an opportunity to reply if it deemed such necessary. The Hearing Officer granted the Consumer Advocate's request. The Consumer Advocate filed comments on *BellSouth Telecommunications, Inc.'s Brief Addressing Section 65-4-122* on December 7, 2001.

³ This date was not discussed during the Pre-Hearing Conference.